Office-Supreme Court, U.S.
FILED
OCT 11 1984
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-403

In The

Supreme Court of the United States

October Term, 1984

DENNIS ALTMAN,

Petitioner,

vs.

PETER F. HURST, Chief of Police of the City of Hickory Hills, Illinois, ERVIN KOZICKI, Mayor of Hickory Hills, Illinois, and THE CITY COUNCIL OF THE CITY OF HICKORY HILLS, ILLINOIS,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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ARGUMENT

The legal principles which govern the decision in this case have been well established by this court and other federal courts for many years. In order for the plaintiff to establish a 42 U.S.C. § 1983 claim based upon the due process clause of the Fourteenth Amendment of the United States Constitution, the plaintiff must first establish a property or liberty right, and second, establish a deprivation without due process. The plaintiff has misconstrued the question presented for review before this court by assuming that he had such a property or liberty right. The question for review is not whether opening the floodgates to federal litigation should act to deprive the plaintiff of his due process rights, but does the plaintiff have a property or liberty interest which was deprived without due process of law.

This case is hardly unique and does not present any questions which are unresolved by federal court decisions, neither does it present a case where the different circuits of the U. S. Court of Appeals are in disagreement on the principles of law. This case simply involves a petty personnel dispute between an employer and an employee.

It has been long established that property rights are created not by the United States Constitution, but are created and derived from state law. *Board of Regents v. Roth,* 408 U.S. 564, 577. A claim of entitlement under state law must be derived from statute or legal rule or through a mutually explicit understanding. *Leis v. Flynt,* 439 U.S. 438, 442 (1979).

The plaintiff cannot rely upon any statutory property right because he was not suspended or discharged. The

courts are unanimous in holding that absent affirmative recognition in law, entitlement to particular job conditions does not support the creation of a property right. *Confederation of Police v. City of Chicago,* 547 F.2d 375, 376 (7th Cir., 1977). Under Illinois law, the defendants have a clear right to change conditions of employment for its employees:

> "The conditions of public employment may be changed. Section 11-1-2 of the Illinois Municipal Code (Ill. Rev. Stat. 1981, Ch. 24, par. 11-1-2) has been held to confer the power to make regulations concerning members of the municipal police force."
>
> *Phillips v. Hall,* App. 2 Dist., 69 Ill.Dec. 201, 447 NE2d 418, 425 (1983).

While the defendants will agree with the U. S. Court of Appeals that the plaintiff's rights are trivial, the simple fact is that they are not rights at all but unilateral expectations which can be changed, and do not arise to the class of property interests protectable by law.

Clearly the plaintiff has no liberty interest in his job assignment, vacation in April, or overtime opportunities as he has not even lost his job. This court has held that even the loss of a job does not amount to a deprivation of a liberty interest as long as a person remains able to locate alternate employment. *Paul v. Davis,* 424 U.S. 693, 709-10 (1976), *reh. denied,* 425 U.S. 985 (1976). This is also true where there has been a denial of a promotion. *Webster v. Redmond,* 599 F.2d 793, 798 (7th Cir., 1979), *cert. denied,* 444 U.S. 1039 (1980). When a public employee retains employment, even after being demoted and defamed, he derives injury only to his reputation and that is not an interest which arises to the level of a pro-

tectable liberty interest. *Moore v. Otero,* 557 F.2d 435, 438 (5th Cir., 1977).

Nowhere in the plaintiff's petition for a writ has he even established the existence of any property or liberty right, he has simply skipped that requirement and gone immediately to the next step arguing that he has been deprived of due process. This court need not even decide the question presented for review as the plaintiff has not established a property or liberty right and the petition should be denied.

Assuming that the plaintiff has a property or liberty right, he has not established that any deprivation without due process of law has occurred. A pre-deprivation hearing or a post-deprivation hearing can satisfy due process. *Mathews v. Eldridge,* 424 U.S. 319 (1976).

The plaintiff has not argued and certainly would have no grounds to argue that a pre-deprivation hearing would be necessary. The substantial interest of the city in managing the day-to-day work schedules of its employees would create an undue burden weighed against the minor interests of the plaintiff. There is no risk of erroneous deprivation because the procedures used by the chief of police give him knowledge of all facts involved. A pre-deprivation hearing is meaningless as there are no constraints on the defendants as to what actions they can take. In this case, no pre-deprivation due process is required as there is nothing to be gained by the plaintiff and substantial administrative burden and loss to the defendants.

If due process must be given, post-deprivation state court remedies are sufficient for purposes of Section 1983. *Parratt v. Taylor,* 451 U.S. 527 (1981) *Hudson v. Palmer,* 104 S.Ct. 3194 (1984). The plaintiff has at least three possible causes of action under state law if, in fact, he has been wronged. He can sue for defamation if he has been defamed. He can sue for intentional infliction of emotional distress, if the conduct of the defendants is extreme and outrageous and results in severe distress such that no reasonable man could be expected to endure it. While the plaintiff argues that such a remedy is not available to him because the conduct in this case is not so severe, he argues in other places that he has a protected interest under the doctrine of constructive discharge because the conduct of the defendants was so severe that no reasonable person would have stayed on the job. If the conduct is so severe, then he has a state court remedy.

The Illinois courts have been presented with cases similar to the plaintiff's and have always given the plaintiff relief if the conduct of the defendants is in bad faith and oppressive. Most recently in *Phillips v. Hall* at p. 423, where a police chief was determined to have acted properly and no judicial intervention was warranted, the court stated that the plaintiff would have a state court remedy if he could prove bad faith and oppressiveness.

Just as this court has resisted the extension of Section 1983 cases in defamation, *Paul v. Davis,* 424 U.S. 693, into medical malpractice, *Estelle v. Gamble,* 429 U.S. 97 (1978), and into false imprisonment, *Baker v. McCollan,* 99 S.Ct. 2689 (1978), so should this court resist the extension into local personnel policies. In all those areas and in this case, adequate state court remedies are avail-

able. The plaintiff would have this court decree a federal personnel policy throughout the land, but such is a matter for local legislatures. If the court were to grant this petition and rule that the plaintiff had a federal cause of action, the next logical step would mean that any contract dispute over personnel policies with a local government would also be a federal case. Clearly if due process is required, the plaintiff can obtain it in state court where local due process personnel disputes should be handled.

CONCLUSION

It is respectfully submitted that the plaintiff has failed to sustain his burden that there are special and important reasons why the writ should be granted. The United States Court of Appeals has correctly decided that this is not a matter establishing a federal cause of action. The petition for certiorari should be denied.

Respectfully submitted,

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